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No. 88-64

Supreme Court, U.S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1988

THE STATE OF MISSOURI, *et al.*,
Petitioners,

v.

KALIMA JENKINS, *et al.*,

and

THE KANSAS CITY, MISSOURI SCHOOL DISTRICT,
Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit

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BRIEF IN OPPOSITION FOR RESPONDENT KCMSD

DAVID S. TATEL
ALLEN R. SNYDER *
PATRICIA A. BRANNAN
DANIEL B. KOHRMAN
HOGAN & HARTSON
555 13th Street, N.W.
Washington, D.C. 20004-1109
(202) 637-5741

SHIRLEY WARD KEELER
BLACKWELL SANDERS MATHENY WEARY & LOMBARDI
Two Pershing Square
2300 Main Street, Suite 1100
Kansas City, Missouri 64141
(816) 274-6800

Attorneys for Respondent Kansas City, Missouri School District

* Counsel of Record

WILSON - EPES PRINTING CO., INC. - 789-0096 - WASHINGTON, D.C. 20001

QUESTION PRESENTED

Whether the Court of Appeals properly upheld the discretion of the District Court to apportion responsibility for plaintiffs' attorneys' fees between the State of Missouri and the Kansas City, Missouri School District based on their relative culpability and the relative amount of time required to litigate claims against them, which resulted in an order that the State pay all such fees.

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BRIEF IN OPPOSITION FOR RESPONDENT KCMSD

STATEMENT OF THE CASE

The attorneys' fees issues which are the subject of the State of Missouri's petition for certiorari arise out of a school desegregation suit initiated in 1977 by the Kansas City, Missouri School District ("KCMSD" or the "District") in order to secure the civil rights of its students and to enable the District to fulfill its constitutional re-

sponsibilities. KCMSD's Board of Directors determined that the District, on its own, had neither the authority nor the resources to overcome the legacy of nearly a century of State-mandated racial segregation. Accordingly, KCMSD and others, including several children in KCMSD schools, filed suit alleging that the State of Missouri and other government entities had operated a dual school system that segregated students on the basis of their race.

In 1978, the District Court realigned KCMSD as a defendant and required the student plaintiffs to obtain separate counsel, out of concern over potential conflicts of interest. *School District of Kansas City, Missouri v. The State of Missouri*, 460 F. Supp. 421, 435, 442 (W.D. Mo. 1978), *appeal dismissed*, 592 F.2d 493 (8th Cir. 1979). The student plaintiffs retained as counsel Mr. Arthur Benson, II, and, later, the NAACP Legal Defense and Educational Fund, Inc. Plaintiffs filed an Amended Complaint virtually identical to KCMSD's original complaint. Prior to trial, KCMSD filed cross-claims against the State and stipulated to its own liability; a lengthy trial ensued due to the refusal of the State to acknowledge its liability. *See Jenkins v. State of Missouri*, 838 F.2d 260, 266 (8th Cir. 1988); *Jenkins v. State of Missouri*, 593 F. Supp. 1485, 1487-88 (W.D. Mo. 1984), *citing* Stipulations of Fact filed February 21, 1984. KCMSD cooperated with the plaintiffs throughout pretrial preparations and during the course of the trial itself. *Jenkins v. State of Missouri*, 838 F.2d at 266.

In 1984, the District Court ruled in favor of plaintiffs against the State of Missouri and KCMSD, and in favor of KCMSD on its cross-claims against the State. *Jenkins v. State of Missouri*, 593 F. Supp. 1485 (W.D. Mo. 1984). The U.S. Court of Appeals for the Eighth Circuit, sitting en banc, affirmed those rulings of the District Court. *Jenkins v. State of Missouri*, 807 F.2d 657 (8th Cir. 1986), *cert. denied*, —— U.S. ——, 108 S. Ct. 70 (1987).

Both the plaintiffs and KCMSD filed applications for attorneys' fees with the District Court pursuant to 42 U.S.C. § 1988. After a one-day evidentiary hearing in February, 1987, the District Court denied KCMSD's application, but granted plaintiffs a substantial fee award, allocating responsibility for paying such fees solely to the State of Missouri. *Jenkins v. State of Missouri*, No. 77-0420-CV-W-4 (W.D. Mo. May 11, 1987) ("Order of May 11, 1987").[1] The Eighth Circuit Court of Appeals unanimously affirmed the District Court's ruling in all respects and denied the State's petitions for rehearing and rehearing en banc. *Jenkins v. State of Missouri*, 838 F.2d 260 (8th Cir. 1988).

Respondent KCMSD files this brief in opposition to the State of Missouri's Petition for Writ of Certiorari, State of Missouri, *et al.* v. Kalima Jenkins, *et al.*, No. 88-64 ("State's Petition for Certiorari"), for the sole purpose of urging the Court to decline review of the second of the five issues presented by the State. That portion of the State's petition asks the Court to reexamine the Eighth Circuit's decision that the District Court was within its discretion in ruling that the State should bear full responsibility for payment of plaintiffs' attorneys' fees and that KCMSD is not obligated to pay any portion thereof. State's Petition for Certiorari at 7-8. The Eighth Circuit carefully reviewed the reasoning of the trial court and concluded that "[t]he district court based its award on the defendants' relative degrees of culpability and the time the plaintiffs were forced to spend litigating against the respective defendants." 838 F.2d at 266. The Court of Appeals held that "[b]oth factors are appropriate considerations in determining who must shoulder the fees award." *Id.* at 266-67 (citations omitted). As to the first factor, the Court of Appeals noted that the District Court

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[1] A full enumeration of the fees requested by and granted to the plaintiffs is set forth in plaintiffs' petition for a writ of certiorari. *See* Kalima Jenkins, *et al.* v. State of Missouri, *et al.*, No. 88-50.

relied on "its earlier conclusion that the State of Missouri was the primary constitutional violator." *Id.* at 266. The decision below also referred to the trial court's observation that the State of Missouri played a more active role than KCMSD in segregation within the District. *Id.*[2]

With respect to the time plaintiffs had to devote to their claims against the defendants in this case, the Eighth Circuit relied on the District Court's finding that "KCMSD had cooperated with the plaintiffs and had conceded liability prior to trial, while the State denied liability, thereby contributing to the necessity of a ten and a half month trial." 838 F.2d at 266.[3] Summarizing the trial court's findings, the Court of Appeals stated that "in effect the district court concluded that KCMSD minimized the need for plaintiffs to incur attorneys' fees, while the State maximized the need." *Id.*[4]

[2] The District Court described the State as primary constitutional violator "because it had mandated separate schools for black and white children prior to 1954, and after 1954 had failed to take any affirmative action to eliminate the vestiges and devastating effects of the dual school system it had created." Order of May 11, 1987, at 15. As the Court of Appeals noted, the District Court found that "[b]y contrast KCMSD did not cause the unlawful segregation but simply failed, as did the State, to disestablish the dual school system created by the State of Missouri and adopted policies which were ineffective in eliminating the unlawful segregation." 838 F.2d at 266. *See also* Order of May 11, 1987, at 15. The District Court also considered it significant that KCMSD was "originally a plaintiff in this action [and] was involuntarily made a defendant by the Court." *Id.*

[3] The District Court also pointed out that the District originally initiated this case as a plaintiff. Order of May 11, 1987, at 16. Regarding the reasonableness of the State's denial of liability and of the resulting length of the liability proceedings, the District Court viewed as important the fact that State of Missouri defendants had previously been "adjudged 'primary constitutional violators' in the St. Louis school desegregation case on facts very similar to those in the [Kansas City] case." *Id.* at 15-16. *See* Liddell v. Board of Education of St. Louis, 491 F. Supp. 351, 359 (E.D. Mo. 1980), *aff'd*, 667 F.2d 643 (8th Cir.), *cert. denied*, 454 U.S. 1081 (1981).

ARGUMENT

I. The Decision Below Apportioning Responsibility for Plaintiffs' Attorneys' Fees to the State of Missouri Is Not Contrary to This Court's Decision in *Kentucky v. Graham.*

Section B (Question No. 2) of the State of Missouri's Petition for Certiorari,[5] declares that the Court of Appeals' decision allocating to the State all responsibility for plaintiffs' attorneys' fees is "contrary to" this Court's decision in *Kentucky v. Graham*, 473 U.S. 159 (1985). State's Petition for Certiorari at 7. The *Graham* decision does not concern the allocation of attorneys' fees between multiple defendants, however, and there is no reason to

[4] The attorneys' fees at issue in the pending petitions for certiorari include work in the pending liability phase of this case and in proceedings to establish a remedy to eliminate the vestiges of the State-mandated segregated school system within the KCMSD. Throughout the remedy proceedings, the District has worked with the plaintiffs to develop effective remedial programs, and the District has been the moving party in establishing the principal components of the remedy. The State, meanwhile, has opposed virtually every program advanced by KCMSD and the plaintiffs, including those that have been approved by the Eighth Circuit and the District Court. *See* Jenkins v. State of Missouri, Nos. 86-1934WM, *et al.* (8th Cir. Aug. 19, 1988) (affirming remedy decision providing magnet schools and capital facilities); Jenkins v. State of Missouri, 807 F.2d 657, 684-686 (8th Cir. 1986), *cert. denied*, —— U.S. ——, 108 S. Ct. 70 (1987) (affirming liability decision and educational programs for remedy); Jenkins v. State of Missouri, No. 77-0420-CV-W-4 (W.D. Mo. June 25, 1988) (order approving virtually all of KCMSD's desegregation budget for years 4 through 6 of remedial plan).

[5] KCMSD's Brief in Opposition is addressed only to Section B of the State's Petition for Certiorari, which concerns Question No. 2 of the five questions posed by the State for review by this Court. The remaining issues raised by the pending petitions for certiorari present questions affecting only the plaintiffs and the State.

believe this Court intended its reasoning in *Graham* to apply to such a case.

In *Graham*, this Court considered an attorneys' fees award against the Commonwealth of Kentucky arising from a finding of liability against several state and local law enforcement officers in a civil rights action. The Court reversed the fee award on the grounds that the Commonwealth of Kentucky was not a defendant in the lawsuit and could not be held responsible simply because it was the employer of the defendant individuals held personally liable. 473 U.S. at 167-69.

The *Graham* decision says nothing about how a trial court should allocate a fee award between multiple defendants. Rather, this Court's opinion concerned the impropriety of an award against a non-party. In particular, the Court expressed its desire to clarify "once again the distinctions between personal- and official-capacity suits." 473 U.S. at 163. Nevertheless, the State asks this Court to apply certain broad language in *Graham* to the question of fee apportionment in this case, and thus, to adopt an interpretation of *Graham* that is wholly unwarranted.[6] The State notes the *Graham* Court declared that "liability on the merits and responsibility for fees go hand in hand," 473 U.S. at 165, but the State fails to acknowledge the narrow context of this statement. The Court should decline the State's invitation to drastically expand the holding in *Graham* to state that reflexively, in every civil rights case, trial courts must allocate responsibility for attorneys' fees among co-defendants according

[6] A close reading of the State's Petition for Certiorari reveals that the State itself does not believe, as it suggests in its statement of its argument, that *Kentucky v. Graham* requires the allocation to KCMSD of some portion of plaintiffs' attorneys' fees. The State's petition argues merely that such a result is "[t]he logical extension" of certain passages in *Graham*. State's Petition for Certiorari at 7-8.

to their liability for the costs of a remedy, regardless of the trial judge's factual findings concerning the relative culpability of the defendants and the relative amount of time required to litigate claims against them.

II. The Decision Below Apportioning Responsibility for Plaintiffs' Attorneys' Fees to the State of Missouri Is Consistent With Other Courts of Appeals Rulings Upholding Factual Findings by District Courts Concerning the Relative Culpability of Defendants and the Relative Time Required to Litigate Claims Against Them.

It is undisputed that the Eighth Circuit properly held that the District Court's allocation of responsibility for attorneys' fees was "reversible only in the event of abuse of discretion." 838 F.2d at 267, *citing Southeast Legal Defense Group v. Adams*, 657 F.2d 1118, 1125-26 (9th Cir. 1981). *See Council for Periodical Distributors Associations v. Evans*, 827 F.2d 1483, 1488 (11th Cir. 1987); *Rogers v. International Paper Co.*, 510 F.2d 1340, 1357 (8th Cir.), *vacated and remanded on other grounds*, 423 U.S. 809 (1975). *See also Moore v. City of Des Moines*, 766 F.2d 343, 346 (8th Cir. 1985), *cert. denied*, 474 U.S. 1060 (1986) (district courts have "wide discretion in the award of attorneys' fees" and an "appeal lies only where the district court has abused its legal discretion").

The Court of Appeals evaluated the factors considered by the District Court in apportioning fees and reviewed the evidence summoned by the District Court in its discussion of those factors. The State does not question the holding in the decision below that the evidence relied on by the District Court in apportioning fees, described *supra* at 3-5, was adequate to support the District Court's "decision to place responsibility for the fees on the State." 838 F.2d at 267. Rather, the State challenges the Eighth Circuit's approval of the apportionment factors relied on by the trial court.

The Court of Appeals had ample authority for its ruling that the District Court properly considered two particular factors with respect to the allocation of attorneys' fees: "the defendants' relative degree of culpability and the time the plaintiffs were forced to spend litigating against the respective defendants." 838 F.2d at 266. As the decision below recognized, consideration of defendants' degree of culpability in apportioning responsibility for fees has repeatedly been approved in the Eighth Circuit. *Id.* at 266-267, *citing Rose v. Nebraska*, 748 F.2d 1257, 1264 (8th Cir. 1984), *cert. denied*, 474 U.S. 817 (1985); *Charles v. Coleman*, 689 F.2d 774, 777 (8th Cir. 1982); *Little Rock School District v. Pulaski County Special School District No. 1*, 787 F.2d 372, 374 (8th Cir.) (Arnold, J., concurring and dissenting), *cert. denied*, 476 U.S. 1186 (1986). *See also Rogers v. International Paper Co.*, 510 F.2d 1340, 1357 (8th Cir.), *vacated and remanded on other grounds*, 423 U.S. 809 (1975) (trial court should weigh culpability of defendants, among other factors, on remand).

The same rule has been followed in other Courts of Appeals. *See Council For Periodical Distributors Associations v. Evans*, 827 F.2d 1483, 1487 (11th Cir. 1987) ("In cases such as the one now before the court, . . ., it may be appropriate for a district court to apportion fees between the active instigator of a wrong and a more passive co-defendant who had a more peripheral role in the wrong"); *Jose P. v. Ambach*, 669 F.2d 865 (2d Cir. 1982) (the trial judge's "decision to apportion fees according to relative culpability was within his discretion").

In approving the District Court's consideration of time spent litigating against each defendant as a factor in apportioning attorneys' fees in this case, the Eighth Circuit relied primarily on decisions by other Circuit Courts of Appeals favoring such a practice. 838 F.2d at 267, *citing Grendel's Den, Inc. v. Larkin*, 749 F.2d 945, 960

(1st Cir. 1984); *Southeast Legal Defense Group v. Adams*, 657 F.2d 1118, 1125-26 (9th Cir. 1981). *See id., citing* Judge Arnold's concurring and dissenting opinion in *Little Rock School District v. Pulaski County Special School District No. 1*, 787 F.2d 372, 374 (8th Cir.), *cert. denied*, 476 U.S. 1186 (1986). *Accord Council for Periodical Distributors Associations v. Evans*, 827 F.2d 1483, 1488 (11th Cir. 1987). The importance of such considerations in allocating fees was also recognized in *United States v. Arkansas*, 791 F.2d 1573, 1577-78 (8th Cir. 1986), in which the court considered a situation similar to that presented in this litigation. The Eighth Circuit declared that when a state and local school districts are co-defendants in a school desegregation case, and the local districts undertake a more vigorous, extensive defense, the state should not be required to pay the local districts' legal fees.

In light of these authorities, there is simply no basis for the suggestion in Section B of the State's Petition for Certiorari that the District Court committed an abuse of discretion by applying the wrong factors in apportioning responsibility for plaintiffs' attorneys' fees in this case. The State cites no authority for the proposition that it is reversible error for a trial court not to allocate responsibility for attorneys' fees in a civil rights case according to the extent of multiple defendants' liability for remedial costs, when that trial court, in apportioning fees, has thoroughly considered the defendants' relative culpability and the relative time required to litigate claims against them. There is accordingly no foundation for the State's position that the Court of Appeals erred in upholding the trial court's discretion to determine that the State of Missouri should bear all responsibility for plaintiffs' fees.

The decision below correctly applied existing law to the facts presented to the District Court, and moreover, is not in conflict with any other circuit court decision. The

Eighth Circuit's ruling consequently presents no basis for the Court to grant further review.

CONCLUSION

For the reasons set forth above, the State of Missouri's Petition for Writ of Certiorari should be denied.

Respectfully submitted,

DAVID S. TATEL
ALLEN R. SNYDER *
PATRICIA A. BRANNAN
DANIEL B. KOHRMAN
HOGAN & HARTSON
555 13th Street, N.W.
Washington, D.C. 20004-1109
(202) 637-5741

SHIRLEY WARD KEELER
BLACKWELL SANDERS MATHENY
WEARY & LOMBARDI
Two Pershing Square
2300 Main Street, Suite 1100
Kansas City, Missouri 64141
(816) 274-6800

Attorneys for Respondent Kansas City, Missouri School District

* Counsel of Record